COMMENT.

The tendency of the day towards consolidation and combination resulting in the large corporations employing thousands of servants, makes some better rule necessary defining who are fellow-servants. The general rule is that "where a master has used due diligence in the selection of competent and trusty servants, and furnishes them with suitable means to perform the service in which he employs them, he is not answerable to one of them for an injury received by him in consequence of the carelessness of another, while both are engaged in the same service." An employee impliedly contracts to assume all the ordinary risks of the business he is engaged in and it is said that on grounds of public policy these should include the risk of injury resulting from the negligence of other servants in the same employment. The reason of this rule is that they are engaged in a common enterprise in which the safety of each depends much on the care and skill with which each performs his appropriate duty. They may observe the conduct of each other, give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer neglects to take such precautions as the safety of the whole may require. But in the case of all of our large corporations, such as railroads, it will be seen that in many cases the reason of the rule fails; for although the men may be said to be in the same employment or service, yet their duties do not bring them habitually together so that they can exercise any of the mutual influence on each other, which is the reason of the rule. And, further, whenever injuries result to one servant from the negligence of another employed by the same master, but the opportunities for such mutual influence do not exist, it is hard to see why the servant should not be allowed to recover on the principle indicated in the maxim, *respondeat superior*. This view has been taken by the Supreme Court of Kentucky, in the recent case of *The Louisville & Nashville Railroad Co.* v. *Raines*, 23 S. W. Rep. 505, in which it was held that a locomotive engineer could recover for injuries received in a collision with another train of the same company, caused by the negligence of the men in charge of the other train. After stating the general rule, the court says: "When one employer has employees engaged in different departments of the same service, and the service in each department is

distinct and separate from that of the other, and neither controlled by the other, but by its own employees, as in the case of service of different railroad trains, operated by the same company, then the rule is different, and the employees belonging to each train and rendering service thereon are not fellow-servants with the employees of the other train in the sense that the one is the agent of the other, and assumes the ordinary risks in reference to the manner that the employees on the other train discharge their duty. In such case the employment in several, and the employees of each train occupy such position in the service with reference to the employees of the other train as precludes their having any control over their actions, or right to advise, even, as to the manner in which the service is to be performed," and "the reason for releasing the company from responsibility ceases to exist, and in such case those controlling and directing the movements of the train with reference to those on another train must be regarded as the agents of the company."

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The legislative body of Massachusetts, acting under the right conferred upon it by the State Constitution of presenting to the justices of the Supreme Court any contemplated act to be passed on as to constitutionality, submitted the three following questions: "*First*, Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the commonwealth? *Second*, Is it constitutional to provide in such an act that it shall take effect in a city or town upon its acceptance by a majority vote of the voters of such city or town? *Third*, Is it constitutional, in an act granting to women the right to vote in town and city elections, to provide that such an act shall take effect throughout the commonwealth upon its acceptance by a majority vote of the voters of the commonwealth, including women specially authorized to register and vote on this question alone?" The court is peculiarly divided in its opinion; four justices hold that all three are properly answered in the negative, two dissent and answer affirmatively, and one agrees with the majority as to the first and third, and with the minority as to the second. Except in the dissenting opinion of Justice Holmes, the constitutionality of an act passed by the legislature conferring on women the right of suffrage in city and town elections is not discussed. The constitutionality of such a law is assumed, and the questions are considered on this

assumption. Justice Holmes, however, disposes of that question first, declaring that he has no doubt that the legislature has power to pass such a law. In the majority opinion, those parts of the constitution of Massachusetts relating to the first question are treated in the light of the opinions of its founders and of the constitutions of the others of the original thirteen States. A pure democratic form of government was not established. The characteristic feature of these constitutions was that they established a government of representatives, and not of the people. After they had created the legislature, the people reserved to themselves no right to an appeal from any legislative, executive or judicial act. "They apparently relied upon frequent elections, when the officers were elected; upon the right of meeting and consulting upon a common good; upon the right of petition and of instructing their representatives; upon impeachment, and upon the right of reforming, altering and totally changing the form of government, when the protection, safety, prosperity and happiness of the people required it. Apparently, it was thought that the persons selected for the executive, legislative and judicial officers in the manner prescribed in the constitution would be men of good character and intelligence, of some experience in affairs and of some independence of judgment, and would have a better opportunity of obtaining information, taking part in discussion and carefully considering conflicting opinions than the people themselves, and the people, therefore, put the responsibility of carrying on the government upon their representatives." Legislative power can not be delegated to any other body or authority, and the people have not retained this power unless it is so expressly provided. While it is true that a general law can be passed to take effect upon the happening of a subsequent event, the weight of opinion is that this event can not be the adoption of the law by the vote of the people. By so doing, "the substance of the transaction is that the legislature declines to take the responsibility of passing the law; but the law has force, if at all, in consequence of the votes of the people; they are ultimately the legislators." The amendments to the constitution regulating the incorporation of cities and towns indicate no intention of having laws submitted to the people for rejection or adoption, although the consent of the inhabitants of cities and towns is necessary before the legislature can incorporate them or change their constitutions. The first question being thus disposed of, the second is considered. "There have been laws from the earliest times which delegated legislative powers to the inhabitants of the towns, or permitted

legislative powers to be exercised by such inhabitants over subjects which were declared proper for municipal control." Examples given are cases where the union of two municipalities is made conditional on acceptance by vote of the inhabitants, and the local option laws, both of which have been held constitutional. But the distinction between these and the present case rests here, that an act granting the right of suffrage to women in town and city elections "relates solely to the persons who should be invested with a share of political power. Whether women should be permitted to vote in town and city elections seems to us a matter of general and not of local concern." It is not a matter of police regulation. In none of the States where the right of suffrage has been conferred on women, has the principle of local option been applied. For similar reasons, the third question is also answered in the negative. Justice Holmes, stating that where extrajudicial opinions are asked, questions like the present are addressed to the court as individuals, and require an individual answer, dissents. The discretion of the legislature is intended to be exercised, but "I think so much confidence is put in it that it is allowed to exercise its discretion by taking the opinion of its principal, if it thinks that course to be wise." The surrender of the sovereignty by the people is not final. In regard to the second question, there are as many objections to a local option with regard to liquor laws as there would be with regard to women suffrage. Justice Barker concurs with Justice Holmes, while Justice Knowlton is of the opinion that the first and third questions should be answered in the negative and the second in the affirmative.